

DRAFT

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2023-F-170

The Board of Professional Responsibility, in response to a request from Chief Disciplinary Counsel, Sandy Garrett, issues this opinion with updated guidelines for an attorney’s acceptance of credit card payments and vacates Formal Ethics Opinions 82-F-28 and 82-F-28(a).

OPINION

In light of changes in the Rules, opinions from other jurisdictions, the Tennessee Supreme Court’s revision of the lawyer advertising rules, and the evolution in the use of credit cards, the Board of Professional Responsibility vacates Formal Ethics Opinions 82-F-28 and 82-F-28(a) and updates guidelines for a lawyer’s acceptance of credit card payments and the use of payment processing services. A lawyer may accept credit cards or payment processing services, such as PayPal, Venmo or other like payment processing services, from a client for payment of fees, including unearned fees (commonly referred to as retainer fees), so long as the lawyer ensures compliance with the applicable Tennessee Rules of Professional Conduct regarding client confidentiality, how credit card transaction fees will be treated, and the security of client trust funds.

DISCUSSION

Tennessee Formal Ethics Opinions 82-F-28 and 82-F-28(a) on credit card payments for legal services and expenses were based on ABA Formal Opinion 338. On July 7, 2000, the American Bar Association withdrew ABA Formal Opinion 338 because it “carried forward from another earlier opinion, Formal Opinion 320 (Legal Fee Finance Plan), series of requirements that are not justified by the present-day Model Rules of Professional Conduct.”¹

Previous ABA Formal Opinion 320 and Informal Opinions 1120 and 1176 were also withdrawn. They required advance approval of advertisements by bar associations regarding the use of credit cards for payment of legal services. “Because the Model Rules require only that any advertising materials used by a lawyer not be false, fraudulent, or misleading, and because they do not require

¹ Standing Committee on Ethics and Professional Responsibility of the American Bar Association, Formal Opinion 00-419, July 7, 2000.

any advance approval by a bar association for a lawyer's participation in a credit-card plan, the Committee hereby withdraws each of the four opinions referred to above."²

Credit cards are recognized as useful in facilitating the ability of many persons to obtain legal services at the time the services are needed and to pay for those services on a schedule that comports with their budgets. Accepting credit card payment of fees provides lawyers with assurance that they will be paid for their services and obviates the need for them to expend time and money pursuing clients who do not pay on time.³

Ethical issues that are presented in accepting payment by credit cards or payment processing services are client confidentiality, how credit card transaction fees will be treated, and the security of client trust funds.

RPC 1.6(a)(1) provides that a lawyer shall not knowingly reveal a confidence or secret of the lawyer's client. "A lawyer may use or reveal client confidences or secrets with the informed consent of the client." See RPC 1.6(e)(1). Therefore, lawyers should advise clients that certain information such as the client's identity will be revealed to the credit card company in credit card transactions and the kind of information that is likely to be disclosed. "A lawyer cannot assume that a client who is paying a bill by credit card has impliedly authorized the attorney to disclose otherwise confidential information."⁴

The use of payment processing services creates privacy risks. "Several Web-based, mobile, and digital payment-processing services and networks ("payment processing services") facilitate payment between individuals, between businesses, or between and individuals and a business. Some are specifically designed for lawyers and law firms (e.g., LawPay and LexCharge), while others are not (e.g. Venmo, PayPal, ApplePay, Circle, and Square). These services operate in different ways. Some move funds directly from the payor's bank account to the payee's bank account, some move funds from a payor's credit card to a payee's bank account, and some hold funds for a period of time before transferring the funds to the payee. Service fees differ for various transactions, depending on the services terms of operation. Some offer more security and privacy than others."⁵

Privacy risks arise "from the potential publication of transactions and user-related information, whether to a network of subscribers or to a population of users interacting with an application. For example, Venmo users, when making a payment are permitted to input a description of the transaction (e.g., '\$200 for cleaning service'). Transactions then are published to the feed of each Venmo user who is a party to the transaction. Depending on the privacy settings of each party to the transaction, other users of the application may view that transaction and even comment on it."⁶

² *Id.* at p.1.

³ Cf., D.C. Ethics Op. 310 (2002) (discussing considerations involved in attorney-client fee agreements and noting certain factors may have a positive impact on the formation of lawyer-client relationships).

⁴ D.C. Ethics Opinion 348 at p. 3 (2009) citing Colorado Formal Ethics Op. 99 (1997).

⁵ Florida Bar Ethics Opinion 21-2 at p. 1 (2021).

⁶ *Id.* at p. 1 and 2.

“Payment processing services typically offer various privacy settings. Venmo, for example enables users to adjust their privacy settings to control who sees particular transactions. The options are (1) ‘Public,’ meaning anyone on the internet will be able to see it, (2) ‘Friends only,’ meaning the transaction will be shared with the ‘friends’ of the participants of the transaction, and (3) ‘Private,’ meaning it will appear only on the personal feeds of the user and the other participant to the transaction. Venmo has a default rule that honors the more restrictive privacy setting between the two users; if either participant’s account is set to Private, the transaction will only appear on the feeds of the participants to the transaction, regardless of the setting enabled by the other participant.”⁷ To protect the client’s confidentiality the lawyer should always select the most secure privacy setting to protect against unwanted disclosure of information relating to the client’s representation.

“The lawyer must take reasonable steps to avoid disclosure by the lawyer as well as by the client, including advising clients of any steps that they should take to prevent unwanted disclosure of information. Although not ethically required, inserting such advice in the lawyer’s retainer or engagement agreement or on each billing statement is wise. For example:

As a convenience to our clients, we accept payment for our services via certain online payment-processing services. The use of these services carries potential privacy and confidentiality risks. Before using one of these services, you should review and elect the privacy setting that ensures that information relating to our representation of you is not inadvertently disclosed to the public at large.”⁸

Treatment of fees charged by credit card or payment processing companies for processing payment raises the issue of whether the lawyer should absorb the fee as the cost of doing business or pass the fee onto the client. Nothing in the Tennessee Rules of Professional Conduct prohibits a lawyer from increasing the lawyer’s fee for legal services to cover any additional cost incurred in accepting credit card or payment processing service payments. The only limitation imposed by the Rules is that the fee must be “reasonable.” See RPC 1.5(a). “Among the factors to be considered in determining whether a fee is reasonable are ‘the limitations imposed by the client or by the circumstances.’ A client’s need to procure legal services from a lawyer whom the client believes is qualified to meet his needs and a client’s decision that using a credit card to pay for the services is the best means of obtaining those services are limitations or circumstances within Rule 1.5. We thus believe that a lawyer properly may pass on to the client the fees charged by credit card companies for processing payment.”⁹ The fee to the client for the convenience of paying by credit card or payment processing service should be no more than the actual cost to the lawyer.

RPC 1.15 mandates that a lawyer has the ethical obligation to place all funds held or received for a client’s benefit into a trust account. “Opinions from other jurisdictions generally conclude that a lawyer may accept credit cards for the payment of advance fees. See California Bar Formal Op. 2007-172 (2007); Colorado Formal Ethics Op. 99 (1997); Massachusetts Bar Ethics Op. 78-11

⁷ See Venmo Help Center, “Payment Activity & Privacy” available at <https://help.venmo.com/hc/en-us/articles/210413717-Payment-Activity-Privacy>.

⁸Florida Bar Ethics Opinion 21-2 at p. 3 (2021).

⁹District of Columbia Ethics Op. 348 at p.3 (2009).

(1978); Michigan Op. R.I. 344 (2008); North Carolina Formal Ethics Op. 97-9 (1998); Oregon Ethics Op. 2005-172 (2005).”¹⁰

An issue relating to the payment of advance fees by credit cards is the practice referred to as “chargeback”. Credit card companies have the requirement that the cardholder (client) have “chargeback” rights pending resolution of a dispute (i.e., the credit card company has the right to access the lawyer’s account to debit funds previously deposited into that account and charge it back to the cardholder).”¹¹ This practice makes it impossible for a lawyer to link an IOLTA account to the credit card company without putting other client’s funds at risk.

Florida and North Carolina have resolved this issue by using a separate “suspense” or trust account for receiving the credit card or payment processing service payments and then immediately transferring the funds to the lawyer’s IOLTA account.¹² The lawyer may establish a trust account for the sole purpose of receiving advance payments by credit card. The lawyer must withdraw all payments to this trust account immediately and deposit them in the lawyer’s “primary” or IOLTA account. In this way the risk of a chargeback that will impact the funds of other clients will be minimized.

Oregon suggests “The simple solution is to limit credit card payments to earned fees.¹³ “A client who wishes to use a credit card for a retainer deposit can do so by obtaining a cash advance that is deposited into the lawyer’s trust account. This method is more costly to the client because cash advances typically carry a higher interest rate than other charges. However, it avoids for lawyers the problems of covering the service charge from the lawyer’s own fund and the risks associated with chargebacks.”¹⁴

In reliance on the Florida Bar Ethics Opinion 21-2 (2021) and the Tennessee Rules of Professional Conduct, lawyers may ethically accept payments via credit cards or a payment-processing service (such as Venmo, PayPal or other like payment processing services), including funds that are property of a client or third person that must be held separately from the lawyer’s own funds under the following conditions:

1. The lawyer must take reasonable steps to prevent inadvertent or unwanted disclosure of information regarding the transaction to parties other than the lawyer and the client or third person making the payment.
2. If the funds are the property of a client or third person (such as advances for costs and fees and escrow deposits), the lawyer must direct the payor to a trust account set up for the sole purpose of receiving advance payments, which are then swept into the lawyer’s IOLTA account, or through a substantially similar arrangement.

¹⁰ *Id.* at p. 7.

¹¹ *Id.*

¹² 97 North Carolina Formal Ethics Op. 9 (1998); Florida Bar Ethics Opinion 21-2 (2021).

¹³ Oregon Formal Op. No. 2005-172 at p. 4 (2005), 2016 revision.

¹⁴ *Id.*

3. The lawyer must ensure that any chargebacks are not deducted from trust funds and that the service will not freeze the account in the event of a payment dispute.
4. The lawyer may charge a convenience fee for the cost charged to the transaction with the prior consent of the client in an amount no larger than the actual transaction cost.

CONCLUSION

The Tennessee Rules of Professional Conduct are “rules of reason” and “should be interpreted with reference to the purpose of legal representation and of the law itself.”¹⁵ When reasonable to do so, the rules should be interpreted to permit lawyers and clients to conduct business in a manner that society has deemed commercially reasonable while still protecting client interests.¹⁶

Updated guidelines for a lawyer’s acceptance of credit card payments and the use of payment processing services require that a lawyer comply with the applicable provisions of the Tennessee Rules of Professional Conduct. A lawyer may accept credit cards or payment processing services, such as PayPal or Venmo or other like payment processing services, from a client for payment of fees, including unearned fees (commonly referred to as retainer fees), so long as the lawyer ensures compliance with the applicable Tennessee Rules of Professional Conduct regarding client confidentiality, how credit card transaction fees will be treated, and the security of client trust funds. A lawyer shall advise clients that the use of credit cards or payment processing services will result in certain information such as the client’s identity being revealed to the credit card company or payment processing service in such transactions and the kind of information that is likely to be disclosed.

This _____ day of _____, 2023.

ETHICS COMMITTEE

Barbara Medley, Chair

Charles K. Grant

Juanita Patton

APPROVED AND ADOPTED BY THE BOARD

¹⁵ Tennessee Rules of Professional Conduct, Scope, Comment [15].

¹⁶ Florida Bar Ethics Opinion 21-2 at p. 5 (2021).